

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Case No: 04-30109-DDO

Robin Ann Olson,

Debtor(s).

**MEMORANDUM OF LAW IN SUPPORT OF
TRUSTEE'S MOTION FOR OBJECTING TO CLAIMED EXEMPTIONS**

INTRODUCTION

Trustee incorporates Debtor's statement of the facts of this case, as set forth in her Memorandum, with one exception. Debtor states that the personal injury claim was settled on or around December 22, 2003. However, correspondence from Debtor's personal injury attorney, John S. Beckmann ("Beckmann"), shows that the Debtor accepted the proposal to settle for \$20,000.00 on or around October 24, 2003. A copy of his letter is attached to Debtor's Memorandum as Exhibit A. Therefore, Trustee asserts that the claim was actually settled two months earlier, in October of 2003. For whatever reason, payment of the settlement was delayed until December 31, 2003.

ISSUE

Whether Debtor's personal injury settlement payment is exempt under USC §522(d)(11)(D).

ARGUMENT

Debtor's personal injury settlement payment is not exempt under USC §522(d)(11)(D).

USC §522(d)(11)(D), the applicable Code section in this matter, states as follows:

(d) The following property may be exempted under subsection (b)(1) of this section:

(11) The debtor's right to receive, or property that is traceable to—

(D) a payment, not to exceed \$17,425, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent.

The Code section specifically allows an exemption for payment for “personal bodily injury,” but does not allow an exemption for payment for “pain and suffering” or “compensation for actual pecuniary loss.”

“Personal bodily injury” is defined by Debtor in her Memorandum. Trustee does not dispute that Debtor suffered personal bodily injury. Rather, Trustee disputes Debtor's contention that her entire settlement represented payment for personal bodily injury and none for pecuniary loss or pain and suffering.

Trustee contends that Debtor's settlement represented payment for medical expenses, lost income and, possibly, cost of future treatment, all of which are characterized as “compensation for actual pecuniary loss” and are, therefore, not exempt. As evidence, Trustee points to Beckmann's letter to Encompass Insurance dated July 16, 2003, attached to Debtor's Memorandum as Exhibit B. In that letter, Beckmann proposed a settlement payment of \$45,000 and set forth the grounds on which that amount was based: medical specials of \$6,403.66, lost income of \$15,525.83, and cost of future chiropractic sessions (\$840/year x 29 years [assuming Debtor retires at age 65]) of \$24,360.00, for a total of \$46,289.49. In his letter, Beckmann discussed Debtor's personal bodily injury, which he called “injuries” and “ongoing symptoms,” but did not attribute a dollar value to them.

Beckmann detailed the amount of actual pecuniary losses, but did not detail any dollar amount for personal bodily injury. It does not make any sense that the \$20,000.00 settlement proposal, accepted by Debtor in October, was meant entirely for personal bodily injury and not at

all for Debtor's actual measurable losses. The insurance company would not have paid Debtor \$20,000.00 for personal bodily injury and nothing for pecuniary loss after Debtor detailed over \$46,000 in pecuniary losses and nothing for the type of damages exempted under §522(d)(11). It is disingenuous for the Debtor to articulate over \$46,000 in pecuniary loss, accept less than half that amount in settlement, and then assume that because there was no description of the damages paid that the recovery was for non-pecuniary loss rather than for pecuniary loss.

Had Debtor proceeded to trial and been awarded damages, it is possible that her award would have included an amount for personal bodily injury. What Debtor received was a settlement payment from an insurance company that was not required to specify exactly what the payment represented. Had there been any written evidence that the settlement was intended to compensate Debtor entirely for personal bodily injury, Debtor undoubtedly would have provided that information to Trustee and to the Court.

Because Trustee is the objecting party in this Motion, Debtor is correct that Trustee has the burden of proof. Rule 4003(c) of the Federal Rules of Bankruptcy Procedure states:

c) Burden of proof

In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections.

However, once Trustee produces evidence rebutting the prima facie effect of Debtor's claimed exemption, the burden shifts back to Debtor to demonstrate that the exemption is proper. *In re Lester*, 141 B.R. 157, 161 (S.D. Ohio, 1991). Debtor must do more to prove the validity of her exemption than to just claim it.

In her Memorandum, Debtor says that her no-fault carrier has already paid her medical expenses of \$6,403.66 and \$2,050.00 of her lost income, for a total of \$8,453.66. Presumably,

Debtor makes this point to show that her settlement payment could not be payment for the same losses. However, Debtor's actual pecuniary losses of \$46,289.49 were greater than her settlement payment of \$20,000.00. So, whether or not the settlement payment included medical expenses or a small amount for lost income is inconsequential.

The Trustee believes the settlement of Debtor's lawsuit was timed in connection with the filing of Debtor's bankruptcy petition. However, the lawsuit settlement did not designate the type of damages that Debtor recovered. The only objective evidence of the type of damages at the time of the litigation, Beckmann's letter of July 16, 2003, substantiates that the recovery was for damages not exemptible under §522(d)(11)(D). This evidence rebuts the prima facie effect of Debtor's claimed exemption. The Court should find that the Trustee has met his burden of proof.

CONCLUSION

The Debtor's personal injury settlement payment is not exempt under §522(d)(11)(D). Based on the letter of Debtor's personal injury attorney to the insurance company, Debtor's medical expenses, lost income and cost of future treatment exceeded \$46,000. Debtor's settlement payment was only for a portion of that amount. The \$20,000 settlement payment must have represented payment for Debtor's medical expenses, lost income and cost of future treatment, all of which are "compensation for actual pecuniary loss" and not exempt under the Code. Thus, the \$7000 in settlement proceeds held by the Debtor at the time of her bankruptcy filing is not exempt.

Dated this 29th day of July, 2004.

/e/Charles W. Ries
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DECLARATION RE: SERVICE BY MAIL

The undersigned, being an employee of Maschka, Riedy & Ries, 200 Union Square Business Center, 201 North Broad Street, Mankato, Minnesota, declares under penalty of perjury that on the 29th day of July, 2004, she served the Memorandum of Law in Support of Trustee's Motion for Objecting to Claimed Exemptions by first class mail to each entity named below at the address stated below for each entity:

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/e/Janet Anderson